No. 96-152

IN THE

Supreme Court of the United States

October Term, 1996

RUDOLPH W. GIULIANI, as Mayor of the City of New York, *et al.*,

Petitioners,

against

HAROLD YOURMAN, *et al., etc.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICUS CURIAE* FOR THE STATES OF NEW YORK, *et al.* IN SUPPORT OF PETITIONERS

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BRIEF AMICUS CURIAE FOR THE STATES OF NEW YORK, *et al.* IN SUPPORT OF PETITIONERS

The amici curiae states, through their attorneys general, respectfully submit this brief in support of the petition for certiorari.

Statement of Interest

Public employment in the amici curiae states, as in most other public entities in the United States, is governed by the principle of public accountability. Because public employers are accountable to taxpayers for the use of public funds, public employees should not and cannot be paid for time in which they do no work. This accountability clashes directly with regulations of the United States Department of Labor (DOL) designed to implement the Fair Labor Standards Act by determining when employees are entitled to overtime compensation and when, because they are "employed in a bona fide executive, administrative, or professional capacity," they are not, 29 USC § 213(a)(1) (Supp. 1996). DOL's definition of this so-called "managerial" exemption includes a "salary basis" component: a government employee is not "paid 'on a salary basis,' " and thus is entitled to overtime, unless his pay "is not subject to reduction because of variations in the quality or quantity of the work performed" and unless he "receive[s] his full salary for any week in which he performs any work without regard to the number of days or hours worked." 29 CFR § 541.118(a) (1995). Government employees, moreover, lose their salaried status and became hourly employees entitled to overtime if a public employer makes deductions for absences caused by "attendance as a witness" or "temporary military leave," *id.* at § 541.118(a)(4), or if the employer makes deductions from an employee's pay for disciplinary violations other than "infractions of safety rules of major significance," *id.* at § 541.118(a)(5).

There is thus a direct conflict between the public accountability principle, which requires that public employees, salaried or otherwise, be paid only for the time they actually work, and the DOL salary basis test, which entitles public employees to overtime pay whenever their pay is reduced because they are not

at work or because they have been disciplined for failing to do their work properly. In the present case, as in most other cases in the circuit courts, the principle of public accountability has gotten much the worst of this clash. New York City, like the amici states, has policies limiting the amount of paid military leave employees may take, requiring that employees use leave balances or lose salary for court appearances as a witness when they or a relative has a personal interest in the proceeding, and subjecting employees to fines or suspensions for a variety of infractions that are not violations of safety rules of major significance. According to the United States District Court for the Southern District of New York, whose decision the Second Circuit adopted without analysis, the existence of these policies and the theoretical possibility of deductions from salary mean that hundreds of employees whose job duties are concededly managerial nonetheless do not meet the salary basis test and thus are entitled to overtime pay. As a result of following the principle of public accountability, New York City faces liability exceeding 14 million dollars.

Obviously, if the Second Circuit's decision is permitted to stand, what has happened to New York City can easily befall other municipalities or states. The public accountability principle requires that, under certain circumstances, deductions be made from the salaries of managerial employees; the salary basis test forbids this. One of these approaches must yield. If it is to be the public accountability principle that falls, exposing states to millions of dollars in liability and undermining their ability to vindicate both the public interest in responsible government expenditure and their own interest in fairly disciplining their employees, that decree should come from this Court, which has never heretofore decided or even addressed the issue. Indeed, part of the reason for the extraordinary abdication by the court below appears to be the Second Circuit's willingness to "leave

the ultimate resolution of the statutory dispute to the Supreme Court" (A6).[1]

Nor do recent developments in this Court make a grant of the petition for certiorari in the present case any less pressing. Thus, the interest of the amici states is not diminished by this Court's decision in *Seminole Indian Tribe of Florida v Florida*, 116 S Ct 1114 (1996). That decision effectively precluded, on Eleventh Amendment grounds, suits under the FLSA by private individuals against states in federal court. Nonetheless, the Department of Labor is itself empowered to sue employers under the FLSA, *see*, 29 USC § 216(c) (Supp. 1996), and may attempt to enforce the salary basis test against the states.

Likewise, it is true that this case raises the issues of whether the salary basis test is violated when government employees are merely "subject to" salary deductions that have not actually occurred, and whether a government employer loses the overtime exemption for an entire class of employees as a result of violating the salary basis test with respect to a single member or isolated members of that class. These issues are presented in *Auer v Robbins*, 65 F3d 702 (8th Cir 1995), *cert. granted*, 116 S Ct 2545 (1996). At the very least, their presence in the case at bar indicates that this Court should retain the case until *Auer* is decided. *See infra*, Point V. But other issues found here and not in *Auer* are also of great importance. The central question in the present case is whether the entire salary basis test, as applied to state and local governments, is arbitrary and capricious and therefore void under the Administrative Procedure Act, *see* 5 USC § 706 (1996). *Auer* does not directly raise this issue. Nor does *Auer* raise the issues of the rationality of DOL's

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[1]Numbers in parentheses preceded by "A" are to pages of the Appendix to the petition for certiorari.

interpretations of its salary basis test as prohibiting deductions from a managerial employee's salary for disciplinary violations, for military leave in excess of a given period, or for appearance as a witness in a proceeding in which the employee or a relative has a personal interest. Under the decision below, a state employer's enforcement of these policies may subject the state, as it did New York City, to millions of dollars in liability for overtime pay, while a state employer who eschews such policies perforce abandons the principle of public accountability. The amici States thus ask that this Court grant certiorari in order authoritatively to resolve all issues connected with application of the salary basis test to government employers.

REASONS FOR GRANTING THE WRIT

I. The decision below, by upholding the salary basis test as applied to government employees, cripples the public accountability principle and effectively deprives the states of the statutory exemption from payment of overtime to their managerial employees.

The Second Circuit attempted to resolve the conflict between the salary basis test and the public accountability principle by upholding the DOL regulation at the expense of a principle that DOL itself acknowledges is "designed to serve the public trust" and reflects the "higher standard of accountability" to which "public employers necessarily must be held." 57 Fed Reg 37669, 37673 (1992). Other federal courts have reached the

same conclusion, sustaining the applicability of the current salary basis test[2] to public employers despite the need of those employers to answer to their constituents for their employees' salaries. *See, Balgowan v State of New Jersey, Dept. of Transportation*, 84 F3d 656, 660-61 (3d Cir), *vacated*, 1996 WL 381898 (3d Cir July 9, 1996); *Mueller v Reich*, 54 F3d 438, 442 (7th Cir), *petition for cert filed*, 64 USLW 3297 (October 24, 1995) (No. 95-586); *cf. Service Employees International Union v County of San Diego*, 60 F3d 1346, 1353 (9th Cir 1995) (striking down entire pre-1992 salary basis test as applied to public sector, but intimating that amended test would survive scrutiny), *cert. denied*, 116 S Ct 774 (1996). These decisions put the states in the untenable position of choosing between loss of the overtime exemption for their managerial employees and abandonment of full accountability to the public for the expenditure of its funds. Because the salary basis test is both irrational as a violation of the public accountability principle and contrary to Congress's desire to preserve the overtime exemption for public employers, its use for public sector employment implicates the Administrative Procedure Act (APA).[3] After more than

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[2]As discussed *infra* and in the petition for certiorari, DOL changed the salary basis test in 1991 to permit public employers to retain the exemption for managerial employees whose salaries are reduced due to "absences for personal reasons or because of illness or injury of less than one day," 29 CFR § 541.5d (1995). Although the amici states agree with petitioners (pp 20-21) that the pre-1991 test is also before the Court, we focus on the test as amended.

[3]Under the APA, courts must set aside agency rules that conflict with Congressional intent or are arbitrary and capricious. *See*, 5 USC § 706 (1996). The amici States agree with petitioner (p 25) that the salary basis test, as an "interpretation" by an agency, must be persuasive rather than

(continued...)

a decade of inconsistent lower court decisions and mushrooming liability, this Court's scrutiny of the salary basis test as applied to public employers is both due and overdue.

To recognize the full force of petitioners' arguments and the urgency of the case, it is necessary above all to understand that the salary basis test is not an end in itself. The FLSA says nothing about "salary basis" or "salaried" employees. Rather, it provides for overtime payments "for a workweek longer than forty hours," exempts from this requirement "any employee employed in a bona fide executive, administrative, or professional capacity," and leaves it to the Secretary of Labor to define such employees. 29 USC §§ 207(a)(1), 213(a)(1) (Supp. 1996). By DOL's own account, it promulgated the salary basis test after hearings confined to testimony from private sector witnesses,[4] which "show[ed] that *bona fide* executive, administrative and professional employees in the industries at that time subject to the FLSA were almost universally paid on a salary basis," and "indicated that employees who did not meet the salary test generally also did not meet the other requirements of the exemption," 57 FR 37672 (1992). These "other requirements" focused on the nature of the duties making for "executive," "administrative" or "professional" employment. *See* 29 CFR §§ 541.1, 541.2, 541.3 (1995).

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[3](...continued)
merely rational in order to survive judicial scrutiny. We note, however, that the salary basis test fails to meet even the more deferential standard.

[4]The FLSA was initially extended to public employers only in 1974, *see*, 57 FR 37667 (1992), and has been enforced continuously as to public employers only since 1986, *see* Fair Labor Standards Amendments of 1985, Pub. Law No. 99-150, § 6.

The salary basis test is thus no more than a surrogate (and indeed, according to DOL, a superfluous) requirement. Its entire function is to serve as an indicator of otherwise-identifiable managerial status. Because this is the sole rationale of the test, it can and must be scrutinized according to whether it "distinguish[es] exempt from nonexempt employees," 57 FR 37670 (1992). In the public sector, because of the public accountability principle, it does not and cannot do so. This principle, DOL has acknowledged, "is derived from the desires of taxpayers that their government be accountable to them for expenditures from the public treasuries," and is aimed at forestalling "wasteful and abusive excesses." *Id.* at 37676. An obvious consequence of the principle is that employees like the present respondents, whose duties are indisputably managerial in nature, cannot be paid with public funds for time not spent on their job duties. This means that an employee who misses work for some reason and has exhausted the applicable leave time cannot be paid for the period during which he misses work. But because DOL's salary basis test requires that a managerial employee "receive his full salary for any week in which he performs any work without regard to the number of days or hours worked," 29 CFR § 541.118(a) (1995), a public sector executive is entitled to overtime if his pay is reduced to account for time he has not worked.

The salary basis test, applied to public employees as a supposed indicator of their managerial status, is thus so irrational that it cannot survive even the most deferential scrutiny. The DOL, in promulgating a regulation permitting public employers to reduce an employee's pay "for absences for personal reasons or because of illness or injury of less than one day," *see*, 29 CFR § 541.5d(a) (1995), recognized this. The agency acknowledged that the salary basis test "could not operate in a manner that effectively distinguished exempt from nonexempt public

employees," 57 FR 37672, although it declined to follow its own reasoning and declare the entire test inapplicable to government employers. The test thus remains in effect, with the result of this case -- more than $14 million in government liability -- by no means atypical. Since the lower courts generally have been unwilling to invalidate the entire test, it is time for this Court to scrutinize the salary basis test and determine what, if anything, supports its application to state and local government.

An additional reason for this Court's scrutiny lies in the APA requirement that agency regulations comport with Congressional intent. No one seriously contends that Congress, in extending the FLSA to state and local government, intended anything but that government employees whose duties are executive, administrative or professional in nature would come within the managerial exemption. Petitioners (pp 19-20) cite legislative history to this effect, and DOL itself concedes that "it is clear from a plain reading of FLSA's legislative history in 1974 * * * that Congress intended for the [managerial] exemption to be available for public sector employees." 57 FR 37672 (1992). The continued existence of the salary basis test, however, in conjunction with the public accountability principle, guarantees that the exemption will *not* be available. In the public sector, where taxpayers' money cannot be given to government employees who have not earned it, managerial status and susceptibility to a reduction in salary for time not spent working are wholly compatible. The salary basis test, however, defeats that managerial status and renders governments liable for overtime pay even to their most highly compensated executives. It thus neutralizes the public accountability principle. If this was truly Congress's intent in extending the salary basis test to the public sector, it is incumbent upon this Court to say so definitively.

Application of the salary basis test to the public sector was, as the outcome below demonstrates, a bad idea. The test does not do what it is supposed to do, undermines a principle central to the operation of state and local government in America and exposes public employers to enormous liability for "overtime" for employees who are not entitled to it under the FLSA. No circuit court has taken a careful look at both root and branch of the salary basis test. The extraordinary abdication of the Second Circuit, in its decision below, suggests that no circuit court is willing or likely to do so. It is up to this Court to undertake definitive scrutiny of the test.

II. This Court should resolve the conflict between the circuits with respect to the DOL regulation applying the salary basis test to a public employee's appearance as a witness in a case in which he has an interest.

Even if this Court does not grant certiorari to undertake a review of the salary basis test *in toto*, it should accept this case to review New York City's policies in light of DOL regulations applying the salary basis test in the three specific circumstances which led to New York City's massive liability in the present case. Among these is New York City's policy that employees must use leave balances or lose salary for court appearances as a witness when they or a relative has a personal interest in the proceeding.[5] The Second Circuit's adoption of the district court's conclusion that "[t]his directly conflicts with the DOL's regulations disallowing deductions from compensation for

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[5]Many states have similar policies. *See, e.g.*, Cal Gov't Code § 1230.1 (West 1996); Ohio Rev. Code Ann. § 124.135 (Anderson 1996); Ga Comp. R. & Regs. § 18.600 (1995); N.J. Admin. Code tit. 4A, § 6-1.20 (1996); N.Y. Comp. Codes R. and Regs. tit. 4, § 21.9 (1996); N.C. Admin. Code tit. 25, r. 1E.1002 (1995).

absences caused by attendance as a witness" (A18) itself conflicts not only with the public accountability principle but also with DOL's own announced policy and with a decision of the Fourth Circuit.

In *Shockley v City of Newport News*, 997 F2d 18 (4th Cir 1993), the Fourth Circuit rejected the claim of municipal employees who contended that they were not subject to the FLSA overtime exemption because city policy required reduction in salary for attendance as a party at trial. A DOL regulation provides that, for employees who are paid on a salary basis, "[d]eductions may not be made for absences of any employee caused by * * * attendance as a witness * * *." 29 CFR § 541.118(a)(4) (1995). Nonetheless, said the Fourth Circuit, a distinction must be made between attendance as a witness and attendance as a party. The former "involve[s] performance of a civic duty," whereas "[a]ttendance as a party does not." 997 F2d at 24. Thus, the court concluded, "reductions in pay for attendance as a party do not run afoul of § 541.118(a)(4)." *Id.*

Significantly, DOL itself takes the same approach. A 1993 Opinion Letter responded to the question of whether an employer "can implement a policy to dock the pay of exempt employees who are absent from work * * * for the purpose of taking part in Court proceedings where the employees are not under statutory or other legal compulsion to be present in Court." Opinion Letter, U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division (December 2, 1993), at 2. Notwithstanding the text of the regulation, DOL opined "that absences from work to attend Court proceedings where the employee is under no legal compulsion to be present in Court are absences for personal reasons," for which deductions may be made. *Id.* at 2-3.

Obviously, a contrary rule also violates the public accountability principle. It is hardly consistent with this principle for an employee to receive a government subsidy for absences due to court appearances in a case that he or a relative has initiated, or in which he or a relative otherwise has a personal stake. As the DOL opinion letter says, this time spent not working is attributable to "personal reasons." Pay for such time would be no more than a gift of state money to an employee.

Despite the foregoing authority and reasoning, the district court, without any supporting reasoning, found a discrepancy between New York City's policy "and the DOL's definition of 'salary basis' in regard to penalties and absences for attendance at court proceedings" (A19). The Second Circuit added nothing to this discussion. Its decision, however, now stands in conflict with the Fourth Circuit's holding in *Shockley*, has subjected New York City to millions of dollars in overtime liability, and threatens to subject other public employers to the same. Only this Court can resolve the conflict and settle the confusions in this area, and it should grant certiorari in order to do so.

III. This Court should grant certiorari in order to determine whether New York City's restriction on paid military leave violates the salary basis test.

The question of the interaction between DOL's prohibition against reduction in a managerial employee's salary for absences due to "temporary military leave" and New York City's policy with respect to such leave is also worthy of this Court's review. In this area, New York City does not dispute the validity of the specific regulation, other than as a component of the overall salary basis test. Pursuant to state statute, New York City, like other public employers in New York State, must pay its employees "for any and all periods of absence while engaged in the

performance of ordered military duty, * * * not exceeding a total of thirty days or twenty-two working days, whichever is greater, in any one calendar year * * *." N.Y. Military Law § 242(5) (McKinney 1990). Most states offer their employees the same amount of or less military leave.[6]

The district court's conclusion, adopted by the Second Circuit, that New York City's "limitation on paid military leave presents the potential for employees on temporary military leave to take leave without pay" in violation of the salary basis test, deserves this Court's scrutiny. New York City (and most States) do not dispute that public employees should receive temporary military leave. The question in this case is whether the thirty or twenty-two days granted by petitioners is sufficient to satisfy the requirements of the salary basis test as to "temporary" military leave.

DOL nowhere defines "temporary" military leave. Other aspects of federal law, however, as well as common sense, suggest that "temporary" leave can be neither infinite nor indefinite in duration. Rather, temporary military leave is most readily conceived as an accommodation to reservists or members of the National Guard, who after all are the only persons whose military obligations are truly temporary. As petitioners note (Br, p 22), federal statutes require only fourteen days per year of active duty training for reservists and fifteen days of active duty training for members of the National Guard. 32 CFR § 101.5(a)(1) (1995); 32 USC § 502(a) (Supp. 1996). Moreover,

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[6]Only three other States grant more paid military leave than New York, with most granting fifteen to twenty days of paid leave. *See* Uniformed Services Almanac, Inc., *National Guard Almanac*, 72-87 (1995); "State Policies," *The Officer*, February 1995, at 98-99.

federal employees are granted paid military leave for no more than fifteen calendar days per year. *See*, 5 USC § 6323(a)(1) (1996).

The obvious inference is that twenty-two -- and indeed, fifteen -- days of annual paid military leave is sufficient to meet the requirements of the salary basis test. Leave for a longer period cannot be called "temporary." Yet the Second Circuit -- the only circuit court to have expressed an opinion on this matter -- has held that any government employer's limitation on the duration of "temporary" military leave runs afoul of the salary basis test and subjects a public employer to liability for overtime pay to all employees subject to this limitation. Before such liability is finally imposed, this Court, even if it does not review the overall applicability of the salary basis test to public employers, should scrutinize whether New York City's restriction on paid military leave violates DOL's prohibition of deductions in managerial salary for "temporary" military leave.

IV. This Court should grant certiorari to determine whether a public employer's policy of making deductions in salary for disciplinary reasons correctly subjected it to loss of the overtime exemptions for its managerial employees.

Even if this Court does not accept this case in order to determine the applicability of the overall salary basis test to public employees, it should grant certiorari to review the Second Circuit's determination that a government employer's use of salary deductions as a means of disciplining its managerial employees deprives the employer of the FLSA overtime exemption. The power to make disciplinary salary deductions is central to the public accountability principle. Before state and local governments can be deprived of it, this Court should

scrutinize the DOL's policy and pass on whether it is justified by the reasons proffered by its proponents.

Like the DOL regulation that deprives government employers of the managerial overtime exemption if they have policies limiting paid temporary military leave or reducing salary for court appearances on personal matters, the DOL policy sharply limiting disciplinary deductions[7] illustrates the fallacy of applying the salary basis test at all to government employers. Because of the public accountability principle, the susceptibility of a highly-compensated public official with indisputably managerial duties to a disciplinary salary deduction indicates nothing about whether he is "employed in a bona fide executive, administrative, or professional capacity." The answer offered by the Second Circuit, adopting without elaboration the district court's reasoning, is that "plaintiffs are subject to penalties for infractions of safety rules not of major significance. A more direct variance by defendants from the DOL regulations defining 'salary basis' is difficult to fathom" (A18). But of course, this answers nothing. If "the DOL regulations defining 'salary basis'" are irrational as applied to public employers, it is up to the courts to say so. The Second Circuit has abdicated its responsibility to resolve the issue, expressly leaving its resolution to this Court.

Some commentators, including at least one circuit court, have suggested that there is no clash between the DOL policy on disciplinary deductions and the public accountability principle.

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[7]Although there is no regulation expressly limiting disciplinary deductions, DOL provides that "[p]enalties imposed in good faith for infractions of safety rules of major significance will not affect the employee's salaried status." 29 CFR § 541.118(a)(5) (1995). Penalties for other infractions, the court below held, deprive an employer of the overtime exemption.

Thus, the Seventh Circuit characterized as "pretty feeble" the implication, in either the public or private sector, "that if an employer measures out discipline in the form of fractions of a weekly salary * * * the employee is really being paid on an hourly basis." *Mueller v Reich*, 54 F3d 438, 443 (7th Cir), *petition for cert filed*, 64 USLW 3297 (October 24, 1995), (No. 95-586). But, that court said, the unavailability of disciplinary deductions does not make for payment without work in violation of the public accountability principle. *Id.* at 442-43. Moreover, the court added, "all the challenged rule prevents is suspensions without pay for less than a week," while leaving public employers free to exercise a variety of alternative sanctions. *Id.* at 443.

DOL itself takes the same view. At the time it promulgated the rule permitting partial-day docking by government employers without loss of the overtime exemption, it professed itself unable to discern "a sufficient basis for distinguishing between the public and private sectors with respect to" disciplinary deductions. 57 Fed Reg 37674 (1992). DOL stated that "[a]lthough public employee terminations may require compliance with procedures designed to protect employee rights, termination for disciplinary reasons is not generally unavailable." *Id.* In any event, DOL added, "other remedies for disciplinary infractions, such as official reprimands, demotions, and reassignment or restriction of duties, are generally available." *Id.*

In the view of the amici States, this demonstrates a disregard for the realities of public employment. First, there is no question that incompetence or indifference on the job implicates the public accountability principle fully as much as unexcused absence from work. A managerial employee who sleeps on the job is fully as offensive to taxpayers demanding accountability

as a managerial employee who sleeps late. Moreover, the view of the Seventh Circuit and DOL grossly overstates the ease with which tenured public employees can be dismissed and, as petitioners observe (p 14), overlooks the principle of "progressive discipline" -- the judicially-enforceable requirement that the punishment of a public employee be proportionate to the offense. For most significant workplace offenses by public employees, suspension without pay for a week or more is too great a penalty, while the "official reprimands" counseled by DOL are meaningless wrist-slaps.

Thus, the DOL prohibition against disciplinary deductions collides directly with the public accountability principle. This case gives this Court an opportunity to apply that principle, universally accepted as central to the operations of state and local governments in America, to both DOL's overall salary basis test and its rules elaborating that test. This Court should not defer the chance to address and resolve these important issues.

V. This Court should retain this case for summary disposition and remand after resolving in *Auer v Robbins* the questions of whether an actual impermissible deduction is required for violation of the salary basis test and whether isolated instances of impermissible deductions subject a government employer to loss of the overtime exemption for an entire class of employees.

Two important questions raised by this case are squarely presented in *Auer v Robbins*, 65 F3d 702 (8th Cir 1995), *cert. granted*, 116 S Ct 2545 (1996). First, as noted by petitioners (pp 34-35), the Second Circuit, unlike the Eighth Circuit in *Auer*, held that the mere possibility of an impermissible deduction in an employee's compensation is sufficient to cause an

employer to lose the overtime exemption. The Eighth Circuit, by contrast, held that an actual deduction from salary must occur before the salary basis test is violated. Second, *Auer* raises the question of whether, when the "actual deduction" rule applies and an otherwise-exempt employee suffers impermissible deductions, a government employer must lose the overtime exemption for an entire class of employees, or instead may employ the DOL "window of correction" when "the employer reimburses the employee for such deductions and promises to comply in the future," 29 CFR § 541.118(a)(6) (1995). As the Court's grant of certiorari in *Auer* presumably indicates, the resolution of these issues is critical to all government employers, regardless of how the other questions raised by the present case are answered. Thus, the Court should at the very least retain this case until *Auer* is decided.

In the present case, the willingness of the Second Circuit, adopting the district court's decision, to conclude "that whether or not penalties have actually been imposed is immaterial to finding that compensation is 'subject to reduction'" (A22) meant that New York City faces millions of dollars in liability because some managerial employee *may* someday face a reduction in salary as a result of taking more than 22 days of military leave in a year or taking time off from work to appear as a witness in his own lawsuit. Here, as in *Auer,* the split in the circuits on this issue (*see*, Petition p 34)[8] and the huge financial consequences of the outcome call for this Court's intervention.

Similarly, the present case, like *Auer,* raises the question of what the remedy should be when the law is that an actual deduction from salary must occur to give rise to employer

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[8]As petitioners note (p 36), DOL itself rejects the "theoretical possibility" approach.

liability and an otherwise-exempt employee suffers a deduction that is impermissible under the salary basis test. In *Auer*, the employee-petitioners urge that the isolated incident of a two-day disciplinary suspension of a single St. Louis police sergeant deprives St. Louis of the overtime exemption not only for that employee but also for all sergeants in its police department. In the present case, as New York City notes (Petition, p 35), a single disciplinary penalty of $258 for one managerial employee ends the overtime exemption for both that employee and all other employees in that class. This case and *Auer* alike demonstrate the need for this Court finally to determine whether isolated impermissible deductions can be cured by government employers, or instead must subject such employers to massive financial liability.

Auer will presumably resolve at least one and perhaps both of the issues it shares with the present case. Thus, even if the Court does not now grant certiorari in this case, it should hold the petition for summary disposition after it decides *Auer*.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

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